U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

ERVIN YATES
Claimant

v.

SPRING HOLLOW COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Date Issued: December 13, 2000

Case No.: 1990-BLA-1865

Counsel on Remand:

Mr. Lawrence L. Moise III, Attorney
For the Claimant

Mr. John D. Maddox, Attorney
For the Employer

Mr. Douglas N. White, Associate Regional Solicitor
For the Director

Before:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter involves a claim filed by Mr. Ervin Yates for benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("Act"). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who

die due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

On September 16, 1997, I issued a Decision and Order on Remand that established the date of entitlement of Mr. Yates' previously awarded black lung disability benefits as August 1, 1981. On May 17, 1999, the Benefits Review Board ("BRB" or "Board") issued a Decision and Order on Reconsideration remanding the case to me for consideration of numerous issues. My decision in this case is based solely on the documents previously admitted into evidence (DX 1 to DX 9, DX 70 to DX 107, CX 1 to CX 15, and EX 1 to EX 18).[1]

Coal Miner's Background

Mr. Ervin Yates was born on May 13, 1918 and worked in the coal mines for at least 34 years (DX 1, DX 3, DX 5, and CX 3). In his last job with Spring Hollow Coal Company in Virginia, he operated an electric coal loader underground (TR, page 35).[2] In 1980, Mr. Yates left the coal mine for an early retirement because he could no longer physically handle the work (TR, page 51). Although he did not smoke cigarettes, Mr. Yates did smoke four pipes of tobacco a day for several years until the early 1980's (DX 91 and TR, page 50).

Procedural Background

An extensive review of the nearly two decades-long procedural history of this case will help frame the issues presently before me for resolution.

Claim - August 1981

Mr. Yates filed his claim for benefits under the Act on August 31, 1981 (DX 1). The District Director ("Director") for the United States Department of Labor ("DOL") denied his claim on March 5, 1982 for failure to establish total disability due to pneumoconiosis. Subsequently, on March 27, 1990, after considering additional medical evidence, the Director again denied the claim for failure to establish total disability (DX 73 and DX 95).

First Administrative Law Judge Decision - August 1991

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[1]The following notations appear in this decision to identify specific evidence: DX - Director exhibit; CX - Claimant Exhibit, EX - Employer exhibit, ALJ - Administrative Law Judge exhibit; and, TR - Transcript of hearing. According to the parties in the April 16, 1991 hearing, there are no exhibits marked DX 10 to DX 69 (TR, page 5). In addition, while EX 15 is no longer in the record, I have ascertained a portion of its contents by referral to a summarization by the employer.

[2]The location where the claimant last engaged in coal mine employment determines which federal Court of Appeals has appellate jurisdiction. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc). In this case, the US Court of Appeals for the Fourth Circuit has jurisdiction.

In response, Mr. Yates appealed to the Office of Administrative Law Judges ("OALJ"). Administrative Law Judge ("ALJ") Glenn Robert Lawrence heard Mr. Yates' appeal of the denial on April 16, 1991. In an August 30, 1991 Decision and Order, Judge Lawrence awarded black lung disability benefits to Mr. Yates. Applying the "true doubt" rule, Judge Lawrence resolved the conflict between the equally persuasive x-ray evidence and medical opinions to find that Mr. Yates had pneumoconiosis.[3] Then, noting that Mr. Yates had 34 years of coal mining experience, Judge Lawrence next applied the presumption of 20 C.F.R. §718.203 to find that Mr. Yates' pneumoconiosis arose out of his coal mine employment.[4] Next, since he could not find total disability by pulmonary function tests, arterial blood gas results, or cor pulmonale, Judge Lawrence again applied the true doubt rule to the conflicting and equally probative medical opinion to determine Mr. Yates was totally disabled.[5] He also found insufficient, contrary evidence. Applying the presumption found in 20 C.F.R. §718.305, Judge Lawrence additionally concluded that Mr. Yates' total disability was due to pneumoconiosis.[6] Finally, in accordance with 20 C.F.R. §725.503(b), because the actual date of onset of the disability was unclear, Judge Lawrence determined Mr. Yates should begin receiving benefits starting September 1, 1981, the month in which he filed his claim.

First BRB Decision - February 1993

The employer appealed the award of benefits on several grounds. The employer alleged Judge Lawrence failed to properly weigh the medical evidence because he automatically applied the "true doubt" rule. The employer argued that the "true doubt" rule was legally impermissible because it gave evidence favorable to one party, the claimant, more weight. Finally, Judge Lawrence erred by also applying the "true doubt" rule in determining whether the regulatory presumption relating to fifteen years of coal mine employment had been rebutted.

DOL urged the BRB to uphold the application of the "true doubt" rule. However, DOL also believed the case should be remanded to the District Director because Judge Lawrence, after finding total

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[3]Under the "true doubt" rule, when confronted with equally convincing yet contrary evidence, administrative law judges would resolve the issues under consideration in favor of the claimant.

[4]20 C.F.R. §718.203 states that if a coal miner has ten or more years of coal mine employment in one or more coal mines, a rebuttable presumption exists that any pneumoconiosis arose out of that employment.

[5]If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §718.204 (b). If that presumption does not apply, then according to the provisions of 20 C.F.R. §718.204, in the absence of contrary evidence, total disability may be established by four methods: (1) pulmonary function tests; (2) arterial blood-gas tests; (3) a showing of cor pulmonale with right sided congestive heart failure; or (4) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area.

[6]Under 20 C.F.R. § 718.305, for claims filed prior to January 1, 1982, if a claimant was employed for fifteen years or more in one or more coal mines, and evidence demonstrates the existence of a totally disabling respiratory impairment, there is a rebuttable presumption that the claimant is totally disabled due to pneumoconiosis.

disability based on medical opinion under 20 C.F.R. §718.204 (c) (4), failed to specifically consider contrary probative evidence to his finding. In addition, although DOL agreed with the employer that Judge Lawrence should not have used the "true doubt" rule in considering rebuttal of the 20 C.F.R. §718.305 presumption, the error was harmless. Specifically, application of the "true doubt" rule means the evidence stands in equipoise. But, on rebuttal, the employer bears the burden of proof. So, if the evidence is equally split, the employer has not established rebuttal by a preponderance of the evidence.

While Mr. Yates' attorney concurred with DOL's position on the "true doubt" rule, he did not agree that a remand was appropriate. In his assessment, Judge Lawrence properly considered contrary probative evidence in resolving the total disability dispute.

On February 18, 1993, the BRB issued a Decision and Order remanding the case to Judge Lawrence. First, the BRB upheld the judge's finding that Mr. Yates could not show total disability by pulmonary function tests and arterial blood gas studies or the presence of cor pulmonale. The Board also affirmed Judge Lawrence's use of the "true doubt" rule in evaluating the chest x-rays to find the presence of pneumoconiosis. And, the Board affirmed Judge Lawrence's application of the presumption in 20 C.F.R. §718.203 to conclude Mr. Yates' pneumoconiosis arose out of his coal mine employment. However, on the issue of total disability, the BRB vacated Judge Lawrence's findings and stated he must identify contrary probative evidence concerning disability and weigh it against the evidence supporting total disability. The BRB set aside Judge Lawrence's conclusion that the medical opinion also established the presence of pneumoconiosis. The BRB also held Judge Lawrence may not use the "true doubt" rule in considering rebuttal of a presumption. Finally, the Board concluded that Judge Lawrence did not sufficiently explain how he assessed the quality of the documentation underlying the conflicting medical opinion.

Second ALJ Opinion - June 1993

On remand, Judge Lawrence re-evaluated the medical opinions concerning Mr. Yates' total disability. Judge Lawrence discredited Dr. Berry's opinion because the physician failed to address Mr. Yates' capabilities from a respiratory standpoint. Judge Lawrence next discredited the opinion of Dr. Modi because of the physician's criminal conviction. According to the Judge, Dr. Stewart's opinion also lacked probative value because his determination that Mr. Yates had the respiratory capacity to perform his usual coal mine employment was based on his finding that Mr. Yates could perform moderate labor, and Judge Lawrence had found that Mr. Yates' last usual coal mine employment involved heavy, arduous labor. Judge Lawrence then turned to the four remaining medical opinions (Dr. Rasmussen, Dr. Robinette, Dr. Fino, and Dr. Dahhan). Judge Lawrence first accorded less weight to Dr. Fino's opinion because he did not actually examined Mr. Yates, unlike the other three doctors. Reasoning that the remaining opinions of Dr. Rasmussen and Dr. Robinette outweighed Dr. Dahhan's assessment , Judge Lawrence concluded that the preponderance of the medical opinion established that Mr. Yates was totally disabled due to pneumoconiosis.

Then, examining the contrary evidence of the non-qualifying pulmonary function and arterial blood gas results, Judge Lawrence found that the results did not necessarily conflict with his finding of total disability. Instead, Dr. Rasmussen and Dr. Robinette, in light of Mr. Yates' complete examination and medical and work histories, concluded that the minimal to moderate degree of impairment indicated by the tests would indeed prevent Mr. Yates from performing his usual coal mine work. Applying the 20 C.F.R. §718.350 presumption based on Mr. Yates' coal mine employment in excess of fifteen years, and after consideration of the medical opinions, x-ray interpretations and the respective contrary evidence, Judge Lawrence concluded that the contrary evidence was not sufficient to overcome his finding of total disability due to pneumoconiosis. Consequently, Judge Lawrence awarded benefits starting September 1, 1981.

Second BRB Decision - January 1995

The employer again appealed Judge Lawrence's decision to grant benefits. The employer asserted Judge Lawrence failed to follow the BRB's previous instructions on remand. Specifically, he failed to properly evaluate contrary medical opinion concerning the existence of total disability. Judge Lawrence also improperly applied the "true doubt" rule in assessing the x-ray evidence on rebuttal of the finding of total disability. Finally, noting that the claimant bears the burden of establishing onset of total disability and the first medical evidence of any such disability appeared in 1987, the employer maintained the earliest date of benefit entitlement was September 1987.

On January 23, 1995, the BRB rendered its second decision on Mr. Yates' 1981 claim. The Board first affirmed Judge Lawrence's finding that the medical opinions established total disability and the invocation of the § 718.305 presumption. Noting that he applied the wrong standard assessing the rebuttal evidence, the BRB found that this error was harmless because the Judge Lawrence's findings meant the employer had not met its burden of proof on rebuttal.[7] However, the BRB also found that the Judge had not sufficiently evaluated the evidence regarding the date of entitlement. Consequently, the BRB remanded the case to review all the evidence of record to determine the date of onset. In December 1996, the BRB denied the employer's July 1995 Motion to Reconsider.

Third ALJ Opinion - September 1997

Upon remand, because Judge Lawrence was no longer available, I was assigned Mr. Yates' case to determine the date of entitlement of benefits based on the onset of his total disability due to pneumoconiosis. Although the partes were debating an onset date between August 1981 and September 1987, I expanded my scope of inquiry to examine a date of onset sometime between August 1980 and

[7]In footnote 7 of the decision, the BRB noted that the U.S. Supreme Court had invalidated the "true doubt" rule in *Director, OWCP v. Greenwich Colleries,* 114 S.Ct. 2251 (1994) *aff'g sub. Nom. Greenwich v. Director, OWCP,* 990 F.2d 730 (3d Cir. 1993). Apparently, because the use of the "true doubt" rule meant the evidence was equally balanced, the employer had not provided the necessary preponderance of the evidence to meet its burden of proof on rebuttal.

September 1987 since Mr. Yates' testimony raised the possibility that the onset of total disability occurred when he retired from coal mining in 1980. After examining all the medical evidence of the record, I first found that Mr. Yates had not proven the onset of total disability when he retired in August 1980. Second, I held that the onset of total disability had already occurred by the time Mr. Yates was examined by Dr. Rasmussen in September 1987. At the same time, I found no probative evidence that established the exact month of onset between the date Mr. Yates filed his claim and Dr. Rasmussen's exam. And, there was not sufficient evidence to show a period of time when Mr. Yates was not clearly totally disabled between the date Mr. Yates filed his claim and Dr. Rasmussen's report. Finally, after closely examining the record evidence that existed prior to September 1987, I was unable to determine the exact month of onset of total disability. Consequently, under 20 C.F.R. § 725.503(b), I found the month of onset of total disability to be August 1981, the month Mr. Yates filed his claim for benefits.

Third BRB Decision - October 1998

The employer appealed my decision concerning the date of entitlement. In its appeal, the employer asserted that the Board's affirmation of Judge Lawrence's findings pursuant to §§ 718.204(c)(4) and 718.305 were no longer consistent with applicable law in light of *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997)[8] and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998).[9] And, the employer argued that there is no evidence in the record to support my finding that benefits should commence as of August 1981.

On October 14, 1998, the BRB upheld my Decision and Order. The BRB first decided to adhere to its previous affirmation of Judge Lawrence's findings pursuant to §§ 718.204(c) and 718.305 because the employer did not advance new arguments in support of altering the BRB's previous holdings and also did not establish any valid exception to the law-of-the-case doctrine. According to the BRB, "the cases cited by the employer do not demonstrate that the BRB's earlier decision was erroneous, but rather are merely more recent cases which discuss issues similar to those raised by the employer in its previous appeal." Noting that I had thoroughly considered all relevant evidence in the record, the BRB affirmed my determination of the onset of disability. Rejecting the employer's contention that claimant had not proven that he was disabled prior to Dr. Rasmussen's 1987 examination, the BRB stated:

> Dr. Rasmussen's opinion may not establish the exact date of onset, but it does indicate that claimant was disabled at some time prior to that date given the progressive nature of pneumoconiosis, and there is no uncontradicted medical evidence demonstrating that claimant was not disabled subsequent to August 1981.

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[8]Resolving a conflict of medical opinion simply based on number of opinions for each side is too shallow an analysis. In addition, there is no presumption that the opinion of an examining physician has greater probative weight. *Akers*, 131 F. 3d at 141

[9]Administrative law judge may not mechanically rely on a doctor's status in resolving conflict between medical opinions. *Hicks*, 138 F.3d at 533.

Fourth BRB Decision - May 1999

The employer requested reconsideration of the BRB's October 1998 decision. The employer contended that the BRB was wrong to affirm Judge Lawrence's findings, asserting that *Akers* and *Hicks*, as intervening authority, constitute valid exceptions to the law-of-the-case doctrine. Specifically, Judge Lawrence erred by discrediting Dr. Fino's opinion solely because he did not examine Mr. Yates, failing to consider the physicians' qualifications, and relying on numerical superiority to resolve conflicting medical opinions. The employer also argued that my determination of the date of entitlement was in error. The Claimant responded, urging affirmation of the BRB's decision. The Director did not respond.

Upon reconsideration, the BRB retracted its original decision and vacated Judge Lawrence's decisions regarding total disability pursuant to 20 C.F.R. §§718.204(c)(4) and 718.305 and remanded the case to me for reconsideration of the medical opinion evidence regarding total respiratory disability in accord with *Akers* and *Hicks*. According to the Board, Judge Lawrence accorded less weight to Dr. Fino's opinion solely because he did not examine Mr. Yates, and, by doing so, failed to account for Dr. Fino's credentials as a pulmonary specialist. Additionally, Judge Lawrence failed to note that Dr. Rasmussen's qualifications were not in the record when he credited Dr. Rasmussen's opinion. Furthermore, contrary to *Akers*, Judge Lawrence impermissibly relied upon numerical superiority to conclude Dr. Dahhan's opinion was outweighed by the opinions of Dr. Rasmussen and Dr. Robinette.

Because the BRB vacated Judge Lawrence's credibility determinations regarding the opinions of Dr. Fino, Dr. Dahhan, Dr. Rasmussen, and Dr. Robinette in light of *Akers* and *Hicks*, it also vacated my findings and credibility determinations of these opinions regarding the date of entitlement. In remanding the case to decide the date of entitlement, the BRB instructed me to consider the opinions of Dr. Dahhan, Dr. Fino, and Dr. Stewart to determine whether review of the pre-1987 objective evidence and their finding of no total respiratory disability provides credible evidence that claimant was not totally disabled due to pneumoconiosis prior to 1987.

ISSUES ON REMAND

1. Whether the medical opinions establish by a preponderance of the evidence that Mr. Yates is totally disabled under 20 C.F.R. § 718.204(c)(4).

2. If Mr. Yates is totally disabled, whether his disability is due to pneumoconiosis.

3. If Mr. Yates is totally disabled due to pneumoconiosis, what is the date of entitlement of benefits under the Act.

Employer's Brief on Remand[10]

On this remand, the employer presents three positions. First, the medical opinions fail to establish total pulmonary disability under 20 C.F.R. §718.204(c)(4). Of the three physicians who declared total disability, each lacks credibility or support to be well reasoned. Specifically, Dr. Modi's opinion lacks credibility due to his criminal conviction, and the opinions of Dr. Rasmussen and Dr. Robinette are improperly conclusory. On the other hand, Drs. Stewart, Fino, and Dahhan provided well reasoned and credible opinions that Mr. Yates is not totally disabled. Second, assuming Mr. Yates is totally disabled, the medical evidence clearly rebuts the 20 C.F.R. §718.305 presumption. Not only do the x-rays establish the absence of pneumoconiosis, but the medical opinions of Drs. Stewart, Fino, and Dahhan establish the absence of "legal" as well as "medical" pneumoconiosis and additionally conclude that any pulmonary disability did not arise out of coal mine employment. Finally, the evidence fails to establish an onset date prior to 1987. Other than Dr. Modi's discredited opinion, there was no evidence of total pulmonary disability let alone total disability due to pneumoconiosis until Dr. Rasmussen's September 1987 report. Additionally, there is a significant amount of contrary probative evidence that Mr. Yates was not totally disabled prior to 1987.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Elements of Entitlement

Under the Act, to receive benefits, a claimant must prove by a preponderance of the evidence several facts. First, the coal miner must establish the presence of pneumoconiosis. In the regulation, "pneumoconiosis" is defined as a chronic dust disease arising out of coal mine employment. The definition further includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[11] Under the Act, the legal definition of pneumoconiosis is much broader than "medical pneumoconiosis." *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Circuit 1996).

Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.[12] If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that pneumoconiosis arose out of such employment.[13] Otherwise, the claimant must provide competent evidence to establish the relationship between pneumoconiosis and coal mine

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[10]The Claimant did not submit a brief on remand.

[11]20 C.F.R. §718.201.

[12]20 C.F.R. §718.203 (a).

[13]20 C.F.R. §718.203 (b).

employment.[14] Third, the coal miner must demonstrate total disability.[15] And fourth, the coal miner must prove the total disability is due to pneumoconiosis.[16]

Regarding the elements of entitlement, Judge Lawrence's findings that Mr. Yates satisfied the first and second elements of entitlement by establishing pneumoconiosis due to his coal mine employment have been upheld by the BRB and are not directly contested in this remand by the employer. However, in the present remand, the Board has indicated that the other two elements of entitlement remain in issue.

Issue # 1 - Total Disability

The third necessary element for entitlement of benefits is total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §718.204 (b). If that presumption does not apply, then according to the provisions of 20 C.F.R. §718.204, in the absence of contrary evidence, total disability may be established by four methods: (1) pulmonary function tests; (2) arterial blood-gas tests; (3) a showing of cor pulmonale with right sided congestive heart failure; or (4) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area.

The BRB upheld Judge Lawrence's determinations that Mr. Yates has neither complicated pneumoconiosis nor cor pulmonale and that neither the valid pulmonary function tests nor the arterial blood gas studies qualify to render Mr. Yates totally disabled. Obviously, the employer does not challenge these findings on remand. Consequently, as the Board instructed, I must determine whether Mr. Yates can establish the third element of entitlement by a preponderance of the medical opinion.

It is important to note in evaluating evidence regarding total disability, the total disability must be respiratory or pulmonary in nature. The Director of the Office of Worker's Compensation Programs has taken the position that to establish totally disability due to pneumoconiosis, a miner must *first* prove that he suffers from a respiratory impairment that is totally disabling separate and apart from other non-respiratory conditions. This approach has been challenged and upheld by at least one United States Courts of Appeals, the U.S. Court of Appeal for the Fourth Circuit.[17]

Medical Opinion

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[14] 20 C.F.R. §718.203 (c).

[15] 20 C.F.R. §718.204 (b).

[16] 20 C.F.R. §718.204 (a).

[17] See *Jewell Smokeless Coal Corporation v. Street*, 42 F.3d 241 (4th Circuit 1994).

When total disability cannot be establish based on the presence of complicated pneumoconiosis, cor pulmonale, qualifying pulmonary function tests, or qualifying arterial blood gas studies, a claimant may still establish total disability through reasoned medical opinion. According to 20 C.F.R. § 718.204 (c) (4), total disability may be found

> if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine employment.

To evaluate total disability under this provision, an administrative law judge must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993).

Exertional Requirements

Based on the above principles, the first step in my analysis is to determine the exertional requirements of Mr. Yates' last coal mine job as a coal loader operator. Based on his hearing testimony, I find Mr. Yates engaged in heavy manual labor. Mr. Yates' last job as a loading machine operator involved loading coal; breaking, shoveling, and loading rock in the case of rock falls at least once a day; lifting 100-150 pound diggers four times per day mostly without assistance; unloading by hand 30 pound timbers out of the car 12-14 times per day; and running the motor (TR, pages 36-42).

Medical Evaluations

Having established the physical requirements of Mr. Yates' coal mine employment, I next review the medical opinion in the record to determine if the preponderance of the medical opinion supports a finding of total respiratory disability. However, prior to evaluating the medical opinions, a review of Mr. Yates' pulmonary and respiratory test results is helpful.

Pulmonary Function Tests

Exhibit	**Date/ Doctor**	**Age/ height**	**FEV_1** pre[18] post[19]	**FVC** pre post	**MVV** pre post	**FEV_1/ FVC** pre post	**Qualified**[20] pre post	**Comments**
DX 8	Jan. 25, 1982 Berry	63 66"	1.87	3.13	64	60%	No[21]	FEV/FVC mildly decreased with slightly decreased FVC. Mild obstructive ventilatory defect due to airways disease.
DX 78	May 19,1982 Buddington	64 66.25"	1.71	3.23	64	53%	No[22]	Moderate obstructive impairment. Valid with slightly subnormal MVV as per Dr. Gaziano (DX 79).
DX 88	Nov 16, 1984 Modi	66 66"	2.03	3.62	67	56%	No[23]	MVV moderately reduced, moderate expiratory reduction, FVC normal.

[18]Test result before administration of a bronchodilator.

[19]Test results after administration of a bronchodilator.

[20]To qualify for total disability, for a miner's age and height, the FEV_1 must be equal to or less than the value in Appendix B, Table B1 of 20 C.F.R. §718, **and either** the FVC has to be equal or less than the value in Table B3, **or** the MVV has to be equal or less than the value in Table B5, **or** the ratio FEV_1/FVC has to be equal or less than 55%.

[21]The qualifying FEV_1 number is 1.70 for age 63 and 66.1". The associated qualifying FVC and MVV values are 2.18 and 68.

[22]The qualifying FEV_1 number is 1.68 for age 64 and 66.1". The associated qualifying FVC and MVV values are 2.16 and 67.

[23] The qualifying FEV_1 number is 1.65 for age 66 and 66.1". The associated qualifying FVC and MVV values are 2.13 and 67.

DX 91	Sept. 9, 1987 Rasmussen	69 65"	1.71 2.13	2.76 3.49	82 98	62% 62%	No[24] No	Relatively poor FVC. Minimal, partially reversible obstruction. Maximum breathing capacity within limits of normal, minimal increase in TLC, marked increase in residual volume. Single breath carbon monoxide diffusing capacity is minimally decreased.
EX 2	Dec. 6, 1990 Dahhan	72 65.75"	1.41 1.54	2.77 3.31	32 52	51% 47%	Yes[25] Yes	Invalid tracings. Fair cooperation, maximal effort not used during forced expiration, resulting in excessive hesitation and excessive variability between the tracings. Invalid as per Dr. Renn (EX 3).
CX 1	Feb. 25, 1991 Robinette	72 66"	1.45 1.90	3.37 3.78	54	43% 50%	Yes[26] No	Flow rated decreased with normal FVC, no significant response after bronchodilators. Volumetric studies revealed normal total lung capacity and residual volume. Moderate obstruction with significant response to bronchodilators, mild air trapping, but diffusion is normal.

[24]The qualifying FEV_1 number is 1.51 for age 69 and 65". The associated qualifying FVC and MVV values are 1.96 and 60.

[25]The qualifying FEV_1 number is 1.54 for age 72 and 65.7". The associated qualifying FVC and MVV values are 2.00 and 62.

[26]The qualifying FEV_1 number is 1.57 for age 72 and 66.1". The associated qualifying FVC and MVV values are 2.04 and 63.

Arterial Blood Gas Studies

Exhibit	**Date/ Doctor**	**$_pCO_2$** (rest) **$_pCO_2$** (exercise)	**$_pO_2$** (rest) **$_pO_2$** (exercise)	**Qualified**[27]	**Comments**
DX 70	Jan. 25, 1982 Berry	41.7	75.5	No[28]	
DX 88	Nov. 16, 1984 Modi	43.4	71.4	No	
DX 91	Sept. 9, 1987 Rasmussen	40 38, 39, 39	69 79, 72, 71	No No[29]	
EX 2	Dec. 6, 1990 Dahhan	41.1 38.1	76.5 84.5	No No	Adequate ventilation both at rest and after exercise.
CX 1	Feb. 25, 1991 Robinette	43.9	72	No	Normal pCO2, decreased pO2. Mild resting hypoxemia.

Dr. B. D. Berry

Mr. Yates was examined by Dr. Berry on January 25, 1982 (DX 9). Dr. Berry noted that Mr. Yates had a history of wheezing attacks, chronic bronchitis, and high blood pressure. According to the physician, Mr. Yates smoked a tobacco pipe four times per day for ten years until 1976. At the examination, Mr. Yates complained of a productive cough, wheezing, dyspnea with exertion, occasional chest pain, orthopnea, paroxysmal nocturnal dyspnea, and ankle edema. These symptoms began in approximately 1980. His lungs were clear upon examination. Dr. Berry diagnosed mild to moderate chronic obstructive pulmonary disease ("COPD") and attributed it to his exposure to coal mine dust because he had worked 30 years in the coal mines.

[27]To demonstrate total respiratory disability, at a coal miner's given $_pCO_2$ level, the value of the coal miner's $_pO_2$ must be equal to or less than corresponding $_pO_2$ value listed in the Blood Gas Tables in Appendix C for 20 C.F.R. §718.

[28]For the $_pCO_2$ values of 40 to 49, the qualifying $_pO_2$ is 60.

[29]For the $_pCO_2$ value of 38, the qualifying $_pO_2$ is 62. For the $_pCO_2$ value of 39, the qualifying $_pO_2$ is 61.

Dr. V.D. Modi

Dr. Modi, board certified in internal medicine,[30] examined Mr. Yates on November 16, 1984 and reported that Mr. Yates had a 40 years history of coal mining (DX 88). According to the physician, Mr. Yates spent the last 15 years of his career as a coal loader until he quit in 1980 due to shortness of breath and bad health. Mr. Yates complained of shortness of breath and general weakness, and offered a medical history including: shortness of breath, productive coughing, wheezing, heart problems, high blood pressure, and bronchitis. He started smoking when he was 20 years old, but quit in 1980 upon his doctor's recommendation.[31] A chest examination revealed a moderately hyper-expanded chest, an increase in the intercostal muscles, a mild increase in resonance on percussion, normal findings on palpitation, and an increase in the expiratory phase of respiration with coarse rhonchi on auscultation. After reviewing positive x-rays by board certified radiologists and B-Readers, and noting a decrease in the oxygenation of arterial blood and moderate obstructive impairment shown in 1982 and 1984 testing, Dr. Modi diagnosed: 1) interstitial pulmonary fibrosis, secondary to coal dust, causing pneumoconiosis, and 2) acute and chronic bronchitis. Dr. Modi concluded that Mr. Yates was totally and permanently disabled because of pneumoconiosis from doing any mining work.

Dr. D.L. Rasmussen

After thoroughly examining and testing Mr. Yates, Dr. Rasmussen, board certified in internal medicine,[32] tendered his medical opinion on September 8, 1987 (DX 91). Dr. Rasmussen noted Mr. Yates' 40 year coal mining history which ended in 1981 after 20 years employment as a loader operator. Mr. Yates' job as a loader operator required him to do considerable crawling and occasionally set timbers. The physician also noted that Mr. Yates never smoked cigarettes, but smoked about three pipes of tobacco daily for two years until 1982. At the exam, Mr. Yates complained of dyspnea upon exertion, chronic productive cough, occasional wheezing on exertion, and occasional paroxysmal nocturnal dyspnea. He reported high blood pressure but no prior respiratory illnesses.

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[30]I take judicial notice of Dr. Modi's board certification and have attached the certification documentation. I also note that due to a criminal conviction, Dr. Modi's license to practice medicine in the state of Virginia was revoked in 1989 (EX 18). Also in 1989, a state of Virginia Medical Board denied Dr. Modi's petition for reinstatement of medical licensing after a full hearing with Dr. Modi represented by counsel. The Board found, in part, that Dr. Modi received payments from the suppliers of oxygen equipment for referral of black lung patients. Part of the agreement between the suppliers and Dr. Modi permitted the suppliers to sign Dr. Modi's name on medical certificates of necessity. The medical board also found Dr. Modi, allegedly under a severe workload, had altered numerous test results of his patients.

[31]Dr. Modi did not indicate whether Mr. Yates' smoked cigarettes or a pipe.

[32]I take judicial notice of Dr. Rasmussen's board certification and have attached the certification documentation.

Upon physical examination, Dr. Rasmussen observed Mr. Yates' chest was essentially normal with minimally decreased breath sounds. A chest x-ray interpreted by Dr. Speiden, a board certified radiologist and a B-Reader, indicated the presence of pneumoconiosis. The ventilatory studies were relatively poor in quality and indicated the presence of a minimal obstructive, partially reversible airways disease. The test also revealed a normal maximum breathing capacity, minimal increase in total lung capacity, and a marked increase in residual volume. The arterial blood gas study revealed a minimally reduced single breath carbon monoxide diffusing capacity and slightly reduced resting arterial oxygen tension. After exercise, Mr. Yates' oxygen transfer was mildly impaired and he was not hypoxic.

Dr. Rasmussen concluded that Mr. Yates has a minimal pulmonary impairment as indicated by his ventilatory impairment, reduced single breath diffusing capacity, and minimal impairment in gas exchange during exercise. This impairment in respiratory function rendered him totally disabled from performing heavy manual labor. The physician recommended that Mr. Yates should have a cardiac evaluation, as he might have cardiovascular disease. Finally, Dr. Rasmussen remarked that because Mr. Yates had a long history of occupational exposure and x-ray evidence of pneumoconiosis, it was reasonable to conclude that he has pneumoconiosis which arose from his occupational exposure. Furthermore, pneumoconiosis must be considered at least a significant contributing factor to his respiratory function impairment.

Dr. A. Dahhan

On December 10, 1990, Dr. Dahhan, board certified in pulmonary disease and internal medicine, conducted a pulmonary examination of Mr. Yates (EX 2). He noted that Mr. Yates spent the last part of his 40 year coal mining career as a loader until retiring in 1980, and smoked a pipe for two years. Mr. Yates complained of an occasional, unproductive cough, dyspnea upon exertion, and occasional edema. He had a history of hypertension, anxiety, and intermittent back pain. Examination of the chest revealed good air entry in both lungs with no wheezing. The arterial blood gases at rest and after exercise showed normal values. The spirometry showed invalid tracings both before and after bronchodilators due to excessive hesitation, which resulted in an artificial reduction in the FEV1. However, the overall ventilatory capacity was normal. The chest x-ray indicated a few q/q opacities[33] in the mid zones and right lower lung zone of 0/1 profusion.[34]

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[33]There are two general categories of small opacities defined by their shape: rounded and irregular. Within those categories the opacities are further defined by size. The round opacities are: type p (less than 1.5 millimeter (mm) in diameter), type q (1.5 to 3.0 mm), and type r (3.0 to 10.0 mm). The irregular opacities are: type s (less than 1.5 mm), type t (1.5 to 3.0 mm) and type u (3.0 to 10.0 mm). JOHN CRAFTON & ANDREW DOUGLAS, RESPIRATORY DISEASES 581 (3d ed. 1981).

[34]The profusion (quantity) of the opacities (opaque spots) throughout the lungs is measured by four categories: 0 = small opacities are absent or so few they do not reach a category 1; 1 = small opacities definitely present but few in number; 2 = small opacities numerous but normal lung markings are still visible; and, 3 = small opacities very numerous and normal lung markings are usually partly or totally obscured. An interpretation of category 1, 2, or 3 means there are opacities in the lung which may be used as evidence of pneumoconiosis. If the

(continued...)

Based on the normal chest examination, normal blood gases, and x-ray evaluation, Dr. Dahhan concluded Mr. Yates did not have occupational pneumoconiosis, or demonstrate any pulmonary disability secondary to coal mine dust exposure. Moreover, Mr. Yates had adequate ventilatory capacity, despite the lack of cooperation during the pulmonary function tests. As a result, Mr. Yates had the respiratory capacity to continue his previous coal mining employment.

In March 1991, Dr. Dahhan, after reviewing Mr. Yates' entire medical record, including the results of his December 1990 examination but without the benefits of Dr. Robinette's February 1991 examination and testing, Dr. Dahhan again rendered his opinion on March 25, 1991 (EX 7). Based on this review, as well as his December 1990 examination, Dr. Dahhan concluded that there was insufficient evidence for a diagnosis of pneumoconiosis for several reasons. The multiple chest x-ray interpretations were negative. Likewise, Dr. Dahhan, Dr. Rasmussen, and Dr. Berry found a normal chest during physical examinations. While the pulmonary function tests revealed an obstructive defect the arterial blood gas studies demonstrated little alteration, if any, in the blood gas exchange mechanisms. Dr. Dahhan concluded that it is possible that Mr. Yates is asthmatic or has a hyperactive airways disease considering his history of wheezing and the reversible nature of his airways obstruction. In particular, he observed the application of bronchodilators in Dr. Rasmussen's pulmonary function tests completely reversed Mr. Yates' bronchospasm. Regarding disability, Dr. Dahhan concluded that Mr. Yates continues to have adequate, if not normal, ventilatory capacity with no evidence or total or permanent pulmonary disability based on the spirometry values obtained by other physicians, the blood measurements on multiple occasions, the clinical examination of the chest, and the negative x-ray findings. His respiratory capacity would allow his return to his previous coal mine employment. At the same time, Mr. Yates continues to struggle with hypertension, cardiac arrhythmia, and anxiety, which are unrelated to his coal mine employment.[35]

Dr. Gregory Fino

In March 1991, Dr. Fino, board certified in pulmonary disease and internal medicine, conducted a review of Mr. Yates' medical record, with the exception of Dr. Robinette's examination, testing, and opinion (EX 7).[36] Dr. Fino recorded that Mr. Yates began working in the coal mines in 1948, and last

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[34](...continued)
interpretation is 0, then the assessment is not evidence of pneumoconiosis. A physician will usually list the interpretation with two digits. The first digit is the final assessment; the second digit represents the category that the doctor also seriously considered. For example, a reading of 1/2 means the doctor's final determination is category 1 opacities but he or she considered placing the interpretation in category 2. However, according to 20 C.F.R. § 718.102 (b), an interpretation of 0/1 does not establish the presence of pneumoconiosis.

[35]Judge Lawrence also admitted into evidence another medical report by Dr. Dahhan, dated July 9, 1991, as part of EX 15. Unfortunately, EX 15, as of December 2000, is no longer to be found in the record and none of the parties referenced the specific contents of the report.

[36]The seventh page of Dr. Fino's March 1991 report is missing from the record. Consequently, I have

(continued...)

worked in 1980 as a loader operator. Although many of the x-ray interpretations indicated pneumoconiosis, Dr. Fino believed that many of the physicians, in accord with their typical practice, "over-read" the films. Moreover, Dr. Fino placed much more reliance on readings of Drs. Scott, Templeton, Wheeler, and Dahhan. Consequently, he opined the radiographic evidence did not show the presence of pneumoconiosis.

Even if Mr. Yates did have pneumoconiosis, it was an incidental finding that did not affect his pulmonary function. Assuming that pneumoconiosis was established, it would cause significant gas transfer impairment and restrictive ventilatory impairment. Yet, there is no evidence of such respiratory problems in Mr. Yates' tests. Instead, the pulmonary function tests from 1982 to 1984 indicate Mr. Yates had an obstructive ventilatory impairment. Because this obstruction showed significant reversibility in 1987, Dr. Fino concluded that Mr. Yates had bronchial asthma. These pulmonary test results, in conjunction with the physical examination findings of airway obstruction and negative x-ray interpretations by Drs. Templeton, Scott, Wheeler, and Dahhan, suggest that Mr. Yates suffers from asthma unrelated to coal mining. The asthma causes only a variable degree of respiratory impairment. When Mr. Yates is treated with bronchodilators, his lung function is normal. Consequently, Mr. Yates does not have a fixed respiratory impairment that would prevent him from returning to his last coal mining job of heavy labor or an occupation requiring similar effort.

Dr. Fino conducted a third medical record review in July 1991 and considered additional medical evidence, including pulmonary function tests and medical opinion developed since his earlier reviews (DX 15).[37] According to Dr. Fino, this new medical evidence did not alter his conclusions that Mr. Yates did not have pneumoconiosis and he did not suffer from "a disabling respiratory impairment."

Dr. Emory H. Robinette

After examining and testing Mr. Yates in February, Dr. Robinette, board certified in pulmonary disease and internal medicine, rendered his medical opinion on March 25, 1991 (CX 1). Observing Mr. Yates' history of exertional dyspnea and congestion, Dr. Robinette noted that he only smoked a pipe in the "distant past." Mr. Yates' occupational history consisted of 40 years mining coal; he worked that last several years as an underground coal loader operator until his retirement in 1980. As a coal loader, Mr. Yates performed a variety of duties, including loader machine operator, cutting machine operator, and

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[36](...continued)
turned to the objective account of this report by Judge Lawrence in his August 1991 Decision and Order. I also note the summary of Dr. Fino's March 1991 opinion is consistent with the summarization by the employer's counsel in the April 1992 Petition for Review.

[37]Judge Lawrence admitted into evidence another medical report by Dr. Fino, dated July 11, 1991, as part of EX 15. As noted, EX 15, as of December 2000, is no longer to be found in the record. However, I have determined the contents of the Dr. Fino's report from the employer's reference to, summary of, and quote from, DX 15 on page 15 of its April 3, 1992 brief in support of its first appeal to the BRB.

hand-loading coal. At the examination, Mr. Yates complained of occasional dizziness, shortness of breath upon exertion, orthopnea, and recurrent episodes of coughing, wheezing, and congestion. His chest had normal diameter, with diminished breath sounds upon auscultation, diffuse wheezes, and moderate prolongation of the expiratory phase. A chest x-ray demonstrated expanded lungs with evidence of mild diffuse interstitial pulmonary fibrosis, emphysematous changes, and scattered, well-defined q/t opacities of a 1/0 profusion consistent with pneumoconiosis in the mid and upper lung zones. Pulmonary function studies revealed a significant respiratory impairment with improvement upon the administration of bronchodilators. Resting arterial blood gas studies showed mild hypoxemia, as indicated by an elevated pCO2 and a decreased pO2.

On the basis of his examination and testing, Dr. Robinette concluded that Mr. Yates had pneumoconiosis as a direct consequence of his prior coal mining employment. The physician also found Mr. Yates to be suffering from a moderate obstructive lung disease with response to bronchodilator therapy, mild resting hypoxemia, and mild hypercapnia. His respiratory impairment was so severe that it would prohibit him from working as an underground coal miner. There was no evidence of a smoking history which would contribute to his current respiratory impairment. Instead, his respiratory symptoms occurred as a direct consequence of his prior coal dust exposure, as supported by radiographic abnormalities and the functional impairment identified in diagnostic studies.

Dr. Bruce N. Stewart

On March 25, 1991, Dr. Stewart, board certified in pulmonary disease and internal medicine, reviewed Mr. Yates' medical records, absent Dr. Robinette's report of examination (EX 6). The DOL employment history form indicated 38 years of coal mining and Mr. Yates' last coal mine employment as a loading machine operator. Dr. Stewart first commented: "[b]ased on these reports, I do not think it is possible to say with a reasonable degree of medical certainty whether or not Mr. Yates does indeed have coal workers' pneumoconiosis." He explained that Mr. Yates certainly has adequate exposure to coal dust, and the majority of physicians reading his x-rays found evidence of pneumoconiosis. However, the majority of physicians who indicated they were B Readers did not find evidence of pneumoconiosis.

Dr. Stewart next reasoned that "Mr. Yates is not totally disabled from a respiratory impairment secondary to coal dust exposure and pneumoconiosis." First, it was not clear whether he had pneumoconiosis. Second, the pulmonary function data from the most recent, valid study by Dr. Modi revealed a normal FVC, minimally reduced FEV_1, and FEV_1/FVC ratio indicative of a moderate obstructive defect. This indicated that Mr. Yates does have a problem getting air to his bronchial tubes. Although Dr. Rasmussen's study was not technically valid, the post-bronchodilator efforts did reveal normal values for the FVC, FEV_1, and MVV. These values can be considered minimal values and it was possible his true lung function would show higher values. Dr. Dahhan's studies revealed a normal FVC value, normal or minimal reductions in the $_pO_2$ both at rest and with exercise, and an improvement in the $_pO_2$ with exercise in the most recent study. The most recent examination by Dr. Dahhan revealed clear lungs, whereas Dr. Rasmussen detected decreased breath sounds, and Dr Modi noted abnormal breath sounds.

Dr. Stewart then concluded that Mr. Yates does have a respiratory impairment which is obstructive in nature. The physician noted that "it is possible to distinguish between respiratory impairments caused by pneumoconiosis and those caused by chronic obstructive pulmonary disease." Since smoking frequently leads to COPD and Mr. Yates may have smoked a pipe for ten years, it is possible that his impairment is due to smoking. Additionally, the decreased breath sounds and coarse rhonchi heard in Mr. Yates' lungs can be found in patients with COPD due to smoking. On the other hand, if Mr. Yates only smoked for two years, as some reports indicate, "we would have to implicate some other cause for the chronic obstructive pulmonary disease such as asthma." Either way, the reduced FEV_1/FVC ratio, which indicated the obstruction of flow through the airways, is not a finding seen with pneumoconiosis.

Finally, on the issue of total disability, Dr. Stewart opined Mr. Yates was not totally disabled due to a pulmonary condition. Specifically, Dr. Stewart concluded that "Mr. Yates retained sufficient respiratory capacity to return to his last job in the mines as a loading machine operator." Explaining, Dr. Stewart stated:

> His degree of respiratory impairment would cause shortness of breath during heavy manual labor. The exercise studies performed and especially the study by Dr. Rasmussen, however, indicate that Mr. Yates does retain the capacity for moderate physical labor.

In July 1991, Dr. Stewart conducted another medical record review which included Dr. Robinette's testing and opinion (EX 16). He generally reiterated his March 1991 conclusions. Dr. Stewart first found that because the great majority of the additional x-ray readings by B-Readers found insufficient evidence to make a diagnosis of pneumoconiosis, Mr. Yates does not suffer from pneumoconiosis. Second, Dr. Stewart again concluded that Mr. Yates is not totally disabled from a respiratory impairment arising out of coal mine employment. The pulmonary function study conducted by Dr. Robinette showed a normal FVC value, only mildly reduced FEV1, and only moderately reduced FEV_1/FVC ratio. Dr. Robinette's arterial blood gas study was also normal. Dr. Stewart reiterated his conclusion that Mr. Yates suffers from an obstructive respiratory impairment that is not related to coal mine dust, but instead is secondary to asthma or tobacco smoke. The pulmonary function studies indicated that Mr. Yates' impairment showed marked reversibility, which is not found in pneumoconiosis, but is consistent with asthma. Both asthma and COPD from smoking are indicated by a reduction in the FEV_1/FVC ratio, as seen with Mr. Yates. Additionally, Dr. Robinette noted wheezing, which is an indicator of COPD. Patients with a restrictive airways disease such as pneumoconiosis will display crackles or rales, which were not found during examinations of Mr. Yates. Finally, Dr. Stewart found that Mr. Yates retains the sufficient respiratory capacity to return to his last job as a loading machine operator. "The patient's medical history indicates that he worked until his retirement. The medical examination reports indicate that although he did have an obstructive impairment, he retained sufficient capacity to perform his last coal mine job."

Discussion

After reviewing the medical opinions, I note that most of the physicians concluded that Mr. Yates does have a respiratory impairment. However, there is a significant difference of opinion between the medical experts on whether Mr. Yates has a respiratory or pulmonary impairment which precludes his return to coal mining. Due to this conflict of opinion, I must initially assign relative probative weight to their diverse medical assessments.

In evaluating medical opinions, an administrative law judge must first determine whether opinions are based on objective documentation and then consider whether the conclusions are reasonable in light of that documentation. A well-documented opinion is based on clinical findings, physical examinations, symptoms, and a patient's work history. *See Fields v. Island Creek Coal Company*, 10 B.L.R. 1-19 (1987) and *Hoffman v. B & G Construction Company*, 8 B.L.R. 1-65 (1985). For a medical opinion to be "reasoned," the underlying documentation and data should be sufficient to support the doctor's conclusion. *See Fields, supra.* In evaluating conflicting medical reports, as with x-ray analysis, it may be appropriate to give more probable weight to the most recent report. *See Clark v. Karst-Robbins Coal Company*, 12 B.L.R. 1-149(1989)(en banc). At the same time, "recency" by itself may be an arbitrary benchmark. *See Thorn v. Itmann Coal Company*, 3 F.3d 713 (4th Cir. 1993). Finally, a medical opinion may be given little weight if it is vague or equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) and *Justice v. Island Creek Coal Company*, 11 B.L.R. 1-91 (1988).

Because Dr. Berry failed to address whether Mr. Yates was disabled in any manner by his respiratory illness, his opinion has no bearing on total disability. Likewise, while some of Dr. Modi's testing may prove helpful, I accord little probative weight to his 1984 medical opinion based both on his subsequent criminal conviction and loss of medical license, which call into question his credibility as a physician.

Next, Dr. Rasmussen's opinion has relatively less probative weight due to the limited documentation for his opinion. He based his conclusions solely on the objective medical evidence developed during the 1987 pulmonary examination of Mr. Yates. In comparison Dr. Dahhan, Dr. Fino, and Dr. Stewart reviewed Mr. Yates' medical record that covered an extensive period of time and included multiple pulmonary examinations and associated non-qualifying pulmonary function tests and arterial blood gas studies. In addition, Dr. Rasmussen based his opinion on pulmonary function test results that he admits were "relatively poor in quality." Finally, Dr. Rasmussen's opinion is not as well reasoned as the other medical opinions. While he concluded that Mr. Yates' minimal impairment totally disabled him from performing heavy manual labor, he failed to explain how a minimal impairment would be totally disabling.

I also accord less probative weight to Dr. Robinette's opinion for similar reasons. Although Dr. Robinette provided the most recent medical data in this record and is a pulmonary specialist, he limited his assessment to the test results of his own pulmonary examination. Due to that limited database, Dr. Robinette's opinion is not as well documented as the opinions of the other pulmonary specialists in this case, Dr. Stewart, Dr. Dahhan and Dr. Fino. In other words, Dr. Robinette's opinion is limited by his failure to consider the other test results, including valid pulmonary function tests which did not indicate total disability,

and other conflicting medical opinions in Mr. Yates' record. In addition, Dr. Robinette's opinion is not particularly well reasoned. While Dr. Robinette indicated Mr. Yates had a moderate impairment that severely disabled him from coal mining, the February 1991 pulmonary function tests showed significant improvement in Mr. Yates' condition after application of bronchodilators and his arterial blood gas study disclosed no impairment whatsoever. In light of these test results, Dr. Robinette did not sufficiently explain why he believed Mr. Yates' pulmonary impairment was moderately severe.

In terms of relative probative weight, Dr. Stewart's opinion also has little value for two reasons. First, Dr. Stewart based his conclusion that Mr. Yates was not totally disabled and consequently could return to his last job as a coal miner on physical level of effort that is less than my finding regarding Mr. Yates' work in the coal mines. In his analysis, Dr. Stewart concluded Mr. Yates was not totally disabled from the perspective of his last job as a coal loader operator because the objective medical evidence indicated that he had the respiratory capacity to accomplish "moderate" manual labor. However, as I previously determined, considering the heavy lifting requirements associated with Mr. Yates' work as a coal loader operator, he engaged in heavy manual labor. In other words, because Dr. Stewart indicated Mr. Yates could accomplish moderate labor, his opinion is not very helpful since the total disability question is framed in terms of whether Mr. Yates has the pulmonary capacity to return to his last coal mine job that required heavy manual labor.

Second, and closely related, Dr. Stewart's conclusion is ambiguous in light of my level of effort determination because Dr. Stewart also stated that Mr. Yates would experience "shortness of breath" when engaged in heavy labor. That assessment appears to support a finding that Mr. Yates is indeed totally disabled if a coal mining job required heavy manual labor. As a result, Dr. Stewart's statement about Mr. Yates' respiratory capacity for heavy manual labor conflicts with his assessment the Mr. Yates is not totally disabled.

Finally, in terms of relative probative weight, the medical opinions of both Dr. Dahhan and Dr. Fino are the best documented, reasoned, and probative assessments in the record. Both physicians considered an extensive medical record and based their opinions on a wide range of medical information, including examining physician reports.

Dr. Dahhan accomplished both an extensive review of the medical evidence and conducted a pulmonary examination of Mr. Yates. While the record now does not contain Dr. Dahhan's July 1991 opinion about the medical evidence from Dr. Robinette's February 1991 pulmonary examination of Mr. Yates,[38] he did consider the test results from his December 1990 evaluation of Mr. Yates. Due to the close temporal proximity of those two examinations and since the test results were nearly the same, I do not find that an absence of his review of Dr. Robinette's report significant in terms of documentation. Additionally, Dr. Dahhan offered a well reasoned opinion. His conclusion that Mr. Yates can return to his previous coal

[38]As I previously noted, the missing EX 15 apparently included Dr. Dahhan's additional review of the record in July 1991 that incorporated Dr. Robinette's evaluation.

mine employment as a loader with no evidence of total or permanent respiratory disability is consistent with his own testing and examination, as well as the preponderance of the other valid, objective medical tests of record, which for the most part do not indicate total respiratory or pulmonary disability.

In a similar manner, Dr. Fino ultimately based his conclusion that Mr. Yates was not totally disabled on a comprehensive review of the entire medical record, including pulmonary function tests and medical opinion presented through June 1991. Dr. Fino's opinion that Mr. Yates could return to his last job and perform heavy manual labor is well reasoned and consistent with the preponderance of the objective medical evidence of the record.

In summary, the preponderance of the most probative medical opinion, the disability diagnoses by Dr. Dahhan and Dr. Fino, indicates that although Mr. Yates has a pulmonary or respiratory impairment, he retains the pulmonary capacity to return to his former coal mining employment as a loading machine operator. Consequently, I find that Mr. Yates cannot establish total disability by a preponderance of the medical opinion under 20 C.F.R. § 718.204(c)(4).

CONCLUSION

The preponderance of the pulmonary function tests, the arterial blood gas studies, and the more probative medical opinion establish Mr. Yates is not totally disabled by a pulmonary or respiratory impairment. As a result, Mr. Yates has failed to prove the third requisite element of entitlement. Accordingly, he is not entitled to an award of benefits under the Act and claim for benefits must be denied.[39]

ORDER

The claim of Mr. ERVIN YATES under the Act is **DENIED**.

SO ORDERED:

[39]Because Mr. Yates is not able to establish total disability, I need not address the other two issues on remand.

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN.: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, DC 20210.